MAJLIS ANGKATAN TENTERA MALAYSIA & ANOR A

v.

MEJAR FADZIL ARSHAD

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
HISHAMUDIN MOHD YUNUS JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-01-519-10]
3 NOVEMBER 2011 C

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Recommendation to cancel commission and force retirement of air force officer to His Majesty - Failure to supply reasons for recommendation - Whether contrary to law - Whether cancellation of commission ultra vires s. 9 Armed Forces Act 1972* D

ARMED FORCES: *Armed Forces Council - Cancellation of commission and forced retirement of officers - Armed Forces Council's recommendation to His Majesty - Failure to give explanation for recommendation - Whether contrary to law - Section 9 of Armed Forces Act 1972 - Whether conferring arbitrary power upon His Majesty to cancel commission of armed forces officers - Whether failure to supply reasons for recommendation fatal* E

CONSTITUTIONAL LAW: *Public Servants - Armed forces officer - Recommendation to cancel commission and force retirement to His Majesty - Failure to supply reasons for recommendation - Whether art. 135(1) of the Federal Constitution expressly excluded armed forces of right to be heard* F

G

The respondent was a commissioned air force officer with the rank of Major with the Royal Malaysian Air Force. Pursuant to a decision made at the first appellant's ('Armed Forces Council') 470th meeting, a recommendation was made to the Yang di-Pertuan Agong ('His Majesty') to cancel the respondent's H commission under s. 9 of the Armed Forces Act 1972 ('the Act') and retire him from service pursuant to reg. 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('the Regulations'). The recommendation received the assent of His Majesty. It was a common ground that I the respondent was not informed of the grounds upon which the

A Armed Forces Council made the decision to make the recommendation. Prior to the decision to cancel the respondent's commission, the respondent was given a show cause letter in respect of allegations of misconduct. However, the matter was not pursued further after the respondent's denial of the allegations by
B way of a respond letter. The respondent, being dissatisfied with the decision to cancel his commission and forced retirement, filed an application for judicial review in the High Court. The High Court held that the Armed Forces Council's decision to recommend to His Majesty to cancel the respondent's commission
C and to retire him was contrary to law by reason of its failure to give an explanation for the recommendation. Hence this appeal against the decision of the High Court.

Held (allowing the appeal with costs)
D **Per Zaleha Zahari JCA (majority):**

(1) The options to end the relationship between the respondent and the appellants are well within the discretion of the appellants and His Majesty. The fact that some allegations of misconduct had earlier been made against the respondent
E would not bar the Armed Forces Council from terminating the services of the respondent pursuant to the terms of employment. (para 14)

(2) It is clear that an officer in the armed forces holds office at
F the will and pleasure of His Majesty by reason of s. 9 of the Act. The words "at any time without assigning any reasons" in s. 9 meant that as far as members of the armed forces is concerned, an arbitrary power is conferred upon His Majesty to cancel the commission of an officer of the armed forces
G upon the recommendation of the Armed Forces Council. A court has no jurisdiction to inquire into the circumstances under which an officer of the armed forces and the respondent ceased to hold office. The learned judge accordingly erred in ruling that it was incumbent upon the appellants to act
H against the respondent by way of a court martial by reason of an earlier alleged misconduct. (para 15)

I

(3) An officer in the armed forces does not enjoy the right of being heard conferred on members of the public services pursuant to the express exclusion of the same contained in art. 135(1) of the Federal Constitution. (paras 16 & 17)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) The letter to His Majesty was not a recommendation for the purpose of s. 9 of the Act but merely a document that purports to be a recommendation. The letter did not contain the necessary facts and the reasons for the 'recommendation' and therefore was highly improper and not in accordance with the intention and spirit of s. 9 of the Act. Further, it could not have been the intention of s. 9 that His Majesty has no discretion at all in the matter and should act in a mechanical manner. Hence, on the facts of the present case, there was no recommendation – or rather, no valid recommendation – of the Armed Forces Council before His Majesty and therefore the act of His Majesty cancelling the respondent's commission was *ultra vires* s. 9 of the Act. (paras 37-39)

(2) His Majesty was required to make a rational and reasonable decision pursuant to the *Wednesbury* principle but that could only be done if he had the facts and reasons before him. Likewise, the Council has a duty to act rationally and reasonably but by its failure to state the facts and reasons, had failed to satisfy the statutory requirement of s. 9 and acted arbitrarily and unreasonably. The court could not assume that the Armed Forces Council had a reason, let alone a reason that is reasonable and rational. The only fair inference that could be drawn was that the Armed Forces Council did not have any reason whatsoever to 'recommend' to His Majesty that the commission of the respondent be cancelled and hence acted unreasonably or arbitrarily. (paras 40 & 41)

(3) Pertaining to the issue of the respondent's forced retirement, although reg. 20(2)(e) of the Regulations does not contain the word "on the recommendation of the Armed Forces Council", it appeared that His Majesty may only act on the recommendation of the Council. However, the Council had failed to provide the facts and reasons for the recommendation and the omission was fatal and the decision of His Majesty was *ultra vires* reg. 20. (para 44)

(4) Further, it is the intention of the Regulations that the respondent was entitled to be notified of the reason as to his forced retirement. There was nothing in the Act that states that an officer who is decommissioned automatically has to be compulsorily retired under reg. 20. (para 45)

Bahasa Malaysia *Translation Of Headnotes*

Responden merupakan pegawai tentera udara bertauliah dengan pangkat Mejar dalam Tentera Udara DiRaja Malaysia. Berikutan satu keputusan yang dibuat dalam mesyuarat perayu pertama ('Majlis Angkatan Tentera') yang ke-470, ianya telah disyorkan kepada Yang di-Pertuan Agong supaya membatalkan pentauliahan responden di bawah s. 9 Akta Angkatan Tentera 1972 ('Akta') dan membersarakan beliau daripada perkhidmatan di bawah peraturan 20(2)(e) Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982 ('Peraturan tersebut'). Syor tersebut menerima perkenan Yang di-Pertuan Agong. Adalah dipersetujui bahawa responden tidak diberitahu tentang alasan yang dijadikan asas oleh Majlis Angkatan Tentera dalam membuat keputusan syor tersebut. Sebelum keputusan untuk membatalkan pentauliahan responden, responden diberikan surat tunjuk sebab berkaitan dengan dakwaan salah laku. Walaubagaimanapun, perkara tersebut tidak dilanjutkan selepas penafian responden terhadap dakwaan tersebut melalui surat jawapannya. Responden yang tidak berpuashati dengan keputusan untuk membatalkan pentauliahannya dan dibersarakan secara paksa, memfailkan permohonan semakan kehakiman di Mahkamah Tinggi. Mahkamah Tinggi memutuskan bahawa keputusan Majlis Angkatan Tentera mengesyorkan kepada Yang di-Pertuan Agong untuk membatalkan pentauliahan dan membersarakan responden adalah melanggari undang-undang disebabkan kegagalan memberikan penjelasan bagi syor tersebut. Maka rayuan ini terhadap keputusan Mahkamah Tinggi.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zaleha Zahari HMR (majoriti):

(1) Pilihan untuk menamatkan perhubungan di antara responden dan perayu-perayu adalah dalam bidang kuasa perayu-perayu dan Yang di-Pertuan Agong. Fakta bahawa dakwaan salah laku tertentu telah pun dibuat terlebih dahulu terhadap responden tidak menghalang Majlis Angkatan Tentera daripada membatalkan perkhidmatan responden di bawah terma-terma pekerjaan.

(2) Adalah jelas bahawa seseorang pegawai dalam angkatan tentera memegang jawatan atas perkenan Yang di-Pertuan Agong di bawah s. 9 Akta. Perkataan "pada bila-bila masa tanpa memberi apa-apa sebab" di dalam s. 9 bermakna bahawa setakat yang berkaitan dengan anggota tentera, kuasa yang arbitrari diberikan kepada Yang di-Pertuan Agong untuk membatalkan pentauliahan seseorang pegawai tentera atas syor Majlis Angkatan Tentera. Mahkamah tidak ada bidang kuasa untuk mempersoalkan keadaan di mana seseorang pegawai tentera dan responden berhenti memegang jawatan mereka. Hakim yang bijaksana dengan itu khilaf dalam memutuskan bahawa perayu-perayu berkewajipan untuk mengambil tindakan terhadap responden melalui mahkamah tentera atas alasan dakwaan salah laku yang terdahulu.

(3) Seorang pegawai tentera tidak mempunyai hak untuk didengar yang diberikan kepada penjawat awam berikutan pengecualian secara jelas perkara tersebut yang terkandung di dalam perkara 135(1) Perlembagaan Persekutuan.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Surat kepada Yang di-Pertuan Agong bukan suatu syor untuk maksud s. 9 Akta tetapi semata-mata dokumen yang dimaksudkan sebagai syor. Surat tersebut tidak mengandungi fakta yang diperlukan dan alasan-alasan untuk 'syor' dan oleh itu adalah amat tidak wajar dan tidak mengikut semangat dan tujuan s. 9 Akta. Selanjutnya, ia tidak mungkin menjadi niat s. 9 bahawa Yang di-Pertuan Agong tidak mempunyai budi bicara langsung dalam perkara tersebut dan perlu bertindak secara mekanikal. Dengan itu, di atas fakta kes ini, tidak ada syor – atau dalam perkataan lain, tidak ada syor yang sah – oleh Majlis Angkatan Tentera kepada Yang di-Pertuan Agong dan dengan itu tindakan Yang di-Pertuan Agong membatalkan pentauliahan responden adalah *ultra vires* s. 9 Akta.

(2) Yang di-Pertuan Agong perlu membuat keputusan yang rasional dan munasabah berikutan prinsip *Wednesbury* tetapi ia hanya boleh dilakukan jika beliau mempunyai fakta dan alasan di hadapannya. Sama seperti itu, Majlis Angkatan Tentera mempunyai kewajipan untuk bertindak secara rasional dan munasabah tetapi dengan kegagalannya menyatakan fakta dan alasan, telah gagal memuaskan keperluan statutori s. 9 dan

A bertindak secara arbitrari dan tidak munasabah. Mahkamah tidak boleh menganggap bahawa Majlis Angkatan Tentera mempunyai alasan, lebih-lebih lagi alasan yang munasabah dan rasional. Satu-satunya inferens yang boleh dibuat adalah bahawa Majlis Angkatan Tentera tidak mempunyai apa-apa
B alasan untuk 'mengesyorkan' kepada Yang di-Pertuan Agong bahawa pentauliahan responden dibatalkan dan dengan itu bertindak secara tidak munasabah dan arbitrari.

(3) Berkaitan dengan isu pemaksaan terhadap responden untuk
C bersara, walaupun peraturan 20(2)(e) Peraturan-Peraturan tidak mengandungi perkataan "atas syor Majlis Angkatan Tentera", adalah jelas bahawa Yang di-Pertuan Agong hanya boleh bertindak atas syor Majlis Angkatan Tentera. Walaubagaimanapun, Majlis Angkatan Tentera telah gagal
D memberikan fakta dan alasan untuk syor tersebut dan peninggalan tersebut adalah menjejaskan dan keputusan Yang di-Pertuan Agong adalah *ultra vires* peraturan 20.

(4) Selanjutnya, adalah niat Peraturan-Peraturan tersebut bahawa
E responden berhak untuk diberitahu mengenai alasan dibersarakan secara paksa. Tidak ada apa-apa di dalam Akta yang menyatakan bahawa seseorang pegawai yang dibatalkan tauliah secara automatik wajib dibersarakan di bawah peraturan 20.

F **Case(s) referred to:**

Abdul Salam Husin v. Majlis Angkatan Tentera & Anor [2009] 1 LNS 1780 CA ***(refd)***

Abdul Salam Husin v. Majlis Angkatan Tentera & Anor [2011] 2 CLJ 1 FC ***(refd)***

G *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223* ***(refd)***

Legislation referred to:

Armed Forces Act 1972, s. 9

Federal Constitution, arts. 41, 132, 135(1), (2), 137(1)

H Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982, regs. 20(2)(e), (g), 22(6)(a)(i)

Other source(s) referred to:

Prof M P Jain, *Administrative Law of Malaysia and Singapore,* 3rd edn, p 495

I

For the appellants - Noor Hisham Ismail (Shamsul Bolhassan with him) SFCs, AG's Chambers
For the respondent - Lt Cdr (B) Zalil Mohd; M/s Zalil Mohd & Partners

[Appeal from High Court, Kuala Lumpur; Judicial Review No: R4(2)-25-345-2008]

Reported by S Barathi

JUDGMENT

Zaleha Zahari JCA:

[1] The majority decision of this court was to allow the appellants' (respondents in the court below) appeal against the decision of the High Court Judge Kuala Lumpur dated 3 August 2010 and to set aside the said decision.

[2] The applicant at the material time was commissioned as an officer with the rank of Major in Tentera Udara Malaysia (TUDM) and was attached to Pengkalan Udara Butterworth, Pulau Pinang. As such an officer the applicant is governed by the Armed Forces Act 1972 ("the Act"), the Army and Air Force (Terms of Service) Regulations 1961 [PU (A) 123/1961] as well as the Regular Forces (Pensions, Gratuities and Other Benefits) (Regulations 1982 [P.U (A) 123/1982] ("the 1982 Regulations").

[3] The Armed Forces Council (the 1st respondent) is established pursuant to art. 137(1) of the Federal Constitution and is responsible for the administration of the armed forces in Malaysia.

[4] What transpired in this case was this. The Panglima Tentera Udara ("PTU") issued a show cause letter dated 5 November 2007 to the applicant in respect of the allegations of misconduct specified therein. The applicant responded by letter dated 16 November 2007 by which letter he denied the allegations of misconduct and negligence specified in the said show cause letter. There was no further action against the applicant arising from this show cause letter.

[5] At the 1st respondent's 470th meeting held on 24 June 2008, the 1st respondent made a decision to recommend to the Yang di-Pertuan Agong to cancel the applicant's commission under s. 9 of the Act and to retire him from service pursuant to reg. 20(2)(e), and be paid retirement benefits up to 90% of his gratuity under reg. 22(6)(a)(i) of the 1982 Regulations. It is common ground that the applicant was not informed of the grounds upon which the 1st respondent made the decision to make the recommendation, which recommendation received the assent of the Yang di-Pertuan Agong on 7 July 2008.

[6] Dissatisfied with this decision the applicant filed an application for judicial review for declaratory orders that the cancellation of his commission under s. 9 was null and void, for that decision to be quashed by way of *certiorari*, for an order of mandamus compelling the respondents to reinstate him, as well as damages.

[7] The High Court Judge ruled that the decision of the 1st respondent, if contrary to law, or if they had acted in excess of jurisdiction was amenable to being reviewed by way of judicial review. The judge further ruled that the Yang di-Pertuan Agong was not required to give the applicant an opportunity to show cause before giving his assent under s. 9 of the Act and reg. 20(2)(e) of the 1982 Regulations. The learned judge then however held, cases of misconduct and negligence by an officer of the armed forces has to be determined by a Court Martial and that no other action could be taken against such an officer. The learned judge then concluded that the decision of the 1st respondent to recommend to the Yang di-Pertuan Agong to cancel the applicant's commission under s. 9 and retire him under 20(2)(e) of the 1982 Regulations was contrary to law by reason of the failure to give an explanation as to why the 1st respondent made the recommendation which they did to the Yang di-Pertuan Agong.

The Submissions

[8] The Senior Federal Counsel submitted that misconduct on the part of a member of the armed forces may be the subject matter of disciplinary action. However it was also open for the respondents to take any other alternative action in respect of such

misconduct. There is a distinction between "cancellation of a commission and retirement" as contrasted with "disciplinary action" taken against an officer of the armed forces.

[9] Section 9 of the Act clearly confers upon the Yang Di-Pertuan Agong the prerogative power, upon the recommendation of the 1st respondent, to cancel an officer's commission. This provision reads as follows:

> The Yang di-Petuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefor cancel any commission granted under the provisions of this Part.

[10] Regulation 20(2)(e) of the 1982 Regulations provides as follows:

> 20. (2) Yang di-Pertuan Agong boleh menghendaki pegawai supaya bersara dari perkhidmatan –
>
> (e) oleh kerana ketidakcekapan atau sebab-sebab lain di dalam kawalannya sendiri tetapi tidak terjumlah kepada salahlaku.

[11] The Senior Federal Counsel highlighted the fact that there was no "decision" as such on the part of the 1st respondent amenable to being reviewed by way of judicial review. The power to decommission under s. 9, and the power to retire an officer under reg. 20(2)(e), lies with the Yang Di-Pertuan Agong and not with the 1st respondent. He submitted that the learned judge erred in ruling that the cancellation of the applicant's commission by the Yang Di-Pertuan Agong under s. 9 of the Act and retirement under reg. 20(2)(e) of the 1982 Regulations was amenable to judicial review. By adopting an objective test as to the reasons why the 1st respondent made its recommendation to the Yang Di-Pertuan Agong to cancel the applicant's commission under s. 9 and to retire him under 20(2)(e) of the 1982 Regulations, the judge had conferred upon himself an appellate jurisdiction which he was not entitled to do. Judicial review is concerned not with the decision, but a review of the manner in which the decision was made. Judicial review is concerned with the decision making process, not with the decision. On this ground alone the application should have been dismissed by the learned judge.

[12] On the issue of whether there is a right for the applicant to be given a hearing by the 1st respondent before making its recommendation to the Yang Di-Pertuan Agong, the SFC submitted that there is no provision for the applicant to be accorded a right to be heard in this case. Article 135(1) read with art. 132 of the Federal Constitution excludes the armed forces services of the right to be heard. Reference was then made to the Court of Appeal's decision in *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2009] 1 LNS 1780, which decision was upheld by the Federal Court in *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1 as authority for this proposition.

[13] On behalf of the applicant/respondent, it was argued that it was incumbent upon the 1st respondent to issue a notice to the applicant stating the grounds upon which 1st respondent proposed to make a recommendation to the Yang Di-Pertuan Agong under s. 9. The 1st respondent had, on the facts of this case, failed to furnish the grounds upon which the recommendation to cancel the applicant's commission and be retired from service was made to the Yang Di-Pertuan Agong. The applicant had accordingly not been accorded an opportunity of being heard contrary to art. 135(2) of the Federal Constitution. The applicant should have been given such an opportunity to be heard at this pre-recommendation stage. The 1st respondent should not have acted arbitrarily. As the applicant had not been given an opportunity of being heard at the pre-recommendation stage, the decision made by the Yang Di-Pertuan Agong based on such a recommendation is accordingly null and void entitling the applicant to the orders applied for, as well as damages.

Decision

[14] Firstly, I observe to note that there is nothing to show that the recommendation of the 1st respondent was based on any alleged misconduct on the part of the applicant. Secondly, on the contention of the applicant that he should be tried through a Court Martial if he had committed any misconduct, I am of the view that the option to end the relationship between the applicant and the respondents are well within the discretion of the respondents and the Yang di-Pertuan Agong. I am of the view that the fact that some allegations of misconduct had earlier been made against the applicant would not bar the respondents from

terminating the services of the applicant pursuant to the terms of employment. It is open for the respondents, as employer, to choose between the two or several options available to end the relationship with an employee.

[15] It is clear that an officer in the armed forces holds office at the will and pleasure of the Yang Di-Pertuan Agong by reason of s. 9 of the Act. The legislative intention by usage of the words "at any time without assigning any reasons" in s. 9 (which power was exercisable not necessarily to cases of misconduct) to cancel any commission must necessarily be construed to mean that, as far as members of the armed forces are concerned, an arbitrary power is conferred upon the Yang Di-Pertuan Agong to cancel the commission of an officer of the armed forces upon the recommendation of the 1st respondent. I am of the view that a court has no jurisdiction to inquire into circumstances under which an officer of the armed forces (of which the applicant was a member) and the circumstances the applicant ceased to hold office. The learned judge accordingly erred in ruling that it was incumbent upon the respondents to act against the appellant by way of Court Martial by reason of an earlier alleged misconduct.

[16] On the complaint of the applicant of being denied an opportunity of being heard by the 1st respondent prior to making its recommendation to the Yang Di-Pertuan Agong and not being put to notice as to grounds upon which the 1st respondent's recommendation was grounded, I am of the following view. The rule of natural justice vary in content and ambit according to the circumstances and context. On the facts of this case the following constitutional provisions applies. Article 132(1) and 135 Federal Constitution states:

> 132 (1) For the purposes of this Constitution, the public services are:
>
> (a) the armed forces;
>
> (b) the judicial and legal service;
>
> (c) the general public service of the Federation;
>
> (d) the public force;
>
> (e) (repealed);
>
> (f) the joint public services mentioned in Article 133;

A (g) the public service of each State; and

(h) the education service.

…

B …

135(1) No member of any of the services mentioned in paragraph (b) to (h) of clause (1) of Article 132 shall be dismissed or reduced in rank by any authority subordinate to that which, at the time of the dismissal or reduction, has C power to appoint a member of that service of equal rank;

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

D **[17]** The express exclusion of the public service of "armed forces" in art. 135(1) must necessarily be construed to mean that an officer in the armed forces does not enjoy the right of being heard conferred on members of the public services mentioned in art. 132. The legislature had clearly evinced an intention to E exclude the operation of the *audi alteram* to officers in this category of public service.

[18] In *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1 at 12 James Foong FCJ speaking for the Federal F Court on this issue, after referring to several authorities, held:

> [17] … , the most prevalent reason seem to stem from the fact that the commission of a member of the armed forces is at the pleasure of the Crown: *durante bene placito* (which basically means: 'during our good pleasure'). When such commission is at the G pleasure of the Crown then conversely it can be withdrawn or cancelled at any time at the pleasure of the Crown. The Crown is not obliged to give any reason for doing so.
>
> [18] Another reason for the deprivation of this right to be heard prior to cancellation of a commission is public policy. As members H of the armed forces play an important role in the defence of the nation, the continuance of any of its members may at times be detrimental to the best interest of the State; the security of the country may be compromised if he is allowed to remain.

I

[19] One other more pertinent reason is the necessity to maintain discipline within the armed forces which is absolutely vital if the military is to be functional and efficient. Any compromise to this would affect discipline and threaten the chain of command necessary to effectively defend the nation.

[20] With the Constitution expressly exempting the armed forces from this right to be heard before cancellation of a commission, can it be argued that this is only limited to the time when the Yang di-Pertuan Agong cancels a commission and not when the Armed Forces Council deliberate on the recommendation to be made? It is my considered view that if the answer is in the positive, the entire provision of cl. 1 in art. 135 of the Constitution as well as s. 9 of the Armed Forces Act would be rendered meaningless. The supreme law of the land and the Armed Forces Act have expressly and unequivocally pronounced the exemption of this right to be heard for members of the armed forces and the rationale for this is already discussed. To give full effect to the objective and intention of these provisions of the law, it is my opinion that this exemption must apply throughout and at every stage leading to the cancellation of the commission. This entire process, though involving stages, cannot be taken separately and by piece meal and interject a right to be heard in a particular stage. If this were to be accepted, then cl. 1 of art. 135 of the Constitution and s. 9 of the Armed Forces Act would be frivolous and nugatory.

James Foong, FCJ then reiterated:

[21] ... that it is the court's duty to give effect to the provisions of the Constitution and statutory law without attempting to modify and qualify it, particularly when there is no ambiguity. There are situations, like in this case, where the laws are explicit and enacted as such for good measures to discount such common law rights of *audi alteram partem* in the armed forces

...

...

...

[25] To repeat, in this instant case there is clear provision of the law in cl. 1 of art. 135 of the Constitution read with art. 132 and s. 9 of the Armed Forces Act divesting such right to be heard for members of the armed forces prior to the cancellation of their commission of service. With such explicit provisions in

A the law, this court is in no position nor would it lend a hand in interpreting into the law such a right. This divested right applies to all stages or tiers leading to the cancellation of the commission. Any attempt to read into the law the existence of such right at some stage of this process would be defeating the true intention and spirit of the Constitution and the relevant provision of the
B Armed Forces Act.

[19] To conclude I am of the view that the High Court Judge erred in ruling that the cancellation of the applicant's commission and retirement to be contrary to law and in allowing the
C applicant's claim. On the contrary I am of the view that the cancellation and retirement of the applicant by the respondents is valid and of full legal effect.

[20] The majority decision was to allow the appeal. The High
D Court Judge's decision is set aside and the applicant's claim is dismissed with costs. Costs of RM5,000 to the appellants.

Hishamudin Mohd Yunus JCA:

[21] This is an appeal against the decision of the High Court of
E Kuala Lumpur (Appellate and Special Powers Division) of 3 August 2010.

[22] The learned judge of the High Court of Kuala Lumpur (Appellate and Special Powers Division) had allowed the
F respondent's application for judicial review against the decision of the Yang di-Pertuan Agong (His Majesty the King):

(1) cancelling the commission of the respondent pursuant to s. 9 of the Armed Forces Act 1972 ('the Act'); and

G (2) requiring of the respondent to retire from service pursuant to reg. 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 ('the Regulations').

[23] The above decision is dated 7 July 2008.

H

[24] Aggrieved by the decision of the High Court, the appellants appeal to this court.

[25] I am dismissing this appeal with costs. The following are my grounds.

I

The Background Facts

[26] The respondent at the time of the cancellation of his commission and his forced retirement was an air force officer of the Royal Malaysian Air Force (RMAF) holding the rank of major. He had been in the armed forces for 27 years. He had been a commissioned officer since August 1981.

[27] In July 2008 he received a message directing him to report to the Human Resource Division of the Air Force Headquarters for a 'career interview'. He reported accordingly as directed. There, at the division, he was told by the director of the division that his commission had been cancelled and that he had been retired under reg. 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. The director showed him a letter dated 8 July 2008 that he received written by one Lt Col Ahmad bin Abd Rahman on behalf of the Chief of the RMAF (Panglima Tentera Udara) addressed to the Human Resource Division of the RMAF. The letter states that the decision to cancel his commission under s. 9 of the Act and to retire him from service under reg. 20(2)(e) of the Regulations was made by the Armed Forces Council at its 470th meeting held on 24 June 2008. The letter does not state the effective date of the cancellation of the commission; but according to para. 1(b) of the letter the forced retirement was to take effect from 17 July 2008.

[28] He was not told the reason for the cancellation of the commission, or the reason as to why he was retired.

[29] Now, what had happened was that, earlier, unbeknown to the respondent, the Armed Forces Council at its 470th meeting held on 24 June 2008 had made a decision to recommend to his Majesty the King pursuant to s. 9 of the Armed Forces Act 1972 and reg. 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 that the commission of the respondent be cancelled and that he be required to retire from service, although he has yet to attain the age of compulsory retirement. The minutes of the 470th meeting of the Armed Forces council reads:

Kementerian Pertahanan
Majlis Angkatan Tentera

KP/MAT(S) 17/812/6 KLT.4 (97)
M/MAT(2008) 470

1 Julai 2008

Minit Mesyuarat Majlis Angkatan Tentera Ke-470
Pada 24 Jun 2008 Jam 11.00 Pagi
Di Bilik Mesyuarat Bunga Raya
Kementerian Pertahanan

Hadir

Yang Amat Berhormat – Pengerusi
Timbalan Perdana Menteri merangkap Menteri Pertahanan
(YAB Dato' Sri Mohd Najib bin Tun Haji Abdul Razak)

Ketua Setiausaha – Setiausaha
(Dato' Abu Bakar bin Hj Abdullah)

Penyimpan Mohor Besar Raja-Raja Malaysia
(YM Engku Tan Sri Ibrahim bin Haji Engku Ngah)

Panglima Angkatan Tentera
(Jeneral Tan Sri Abdul Aziz bin Haji Zainal)

Panglima Tentera Darat
(Jeneral Tan Sri Muhammad Ismail bin Haji Jamaluddin)

Panglima Tentera Laut
(Laksamana Datuk Abdul Aziz bin Haji Jaafar)

Panglima Tentera Udara
(Jeneral Tan Sri Dato' Sri Azizan bin Ariffin TUDM)

Ketua Staf Markas Angkatan Tentera Malaysia
(Leftenan Jeneral Datuk Haji Shahron bin Haji Ibrahim TUDM)

Asisten Ketua Staf Perkhidmatan Anggota
(Mejar Jeneral Datuk Abdul Aziz bin Ibrahim)

Mej Fadzil bin Arshad TUDM (713116) Kejuruteraan

(1) Dibatalkan tauliah daripada perkhidmatan Angkatan Tentera Malaysia di bawah Seksyen 9, Akta Angkatan Tentera 1972.

(2) Dibersarakan daripada perkhidmatan Angkatan Tentera mulai 17 Julai 2008 di bawah Peraturan 20(2)(e), Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982.

(3) Diberi Pencen Perkhidmatan dan Ganjaran Perkhidmatan pada kadar 90 peratus di bawah Peraturan 22(6)(a)(i), Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982.

(4) Tidak dibenarkan mengikuti Latihan Peralihan sebagaimana yang ditetapkan oleh PMAT Bilangan 5 Tahun 2005.

(5) Dikehendaki membayar balik baki Pinjaman Perumahan Kerajaan mengikut kadar faedah semasa yang ditetapkan oleh Perbendaharaan melalui potongan bayaran pencen bulanannya yang diterimanya.

(6) Tidak dibenarkan mengguna gelaran pangkat Mejar TUDM yang disandang sekarang selepas bersara daripada perkhidmatan berdasarkan Perenggan 4 dan 5 kepada Perintah Majlis Angkatan Tentera Bilangan 1 Tahun 1975.

Keputusan ini adalah tertakluk kepada perkenan Seri Paduka Baginda Yang di Pertuan Agong

Tindakan: Sekretariat MAT

Panglima Tentera Udara

Rujuk: MATM/J1 CTK/TKB/146/3/9/500 bth 23 Jun 2008

[30] The Armed Forces Council is established under art. 137 of the Federal Constitution. Under cl. (1) of art. 137 the Armed Forces Council is responsible under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of the armed forces.

[31] It is significant to note that the minutes of the 470th meeting of the Armed Forces Council do not state the facts and the reasons for the decision.

[32] The letter of 'recommendation' (as to why I am putting the word 'recommendation' in inverted comas will be apparent shortly) to His Majesty dated 27 June 2008 was written by the Secretary of the Armed Forces Council. It reads:

Majlis Angkatan Tentera,
Kementerian Pertahanan,
Tingkat 5, Wisma Pertahanan.
Jalan Padang Tembak
50634 Kuala Lumpur

KP/MAT(S)17/811/1/8 KLT.12(76)

27 Jun 2008

Encik Mohd Zuki bin Ali
Setiausaha Sulit Kanan Kepada

SPB Yang di-Pertuan Agong
Istana Negara
50500 Kuala Lumpur

Diperkenankan
t.t.
Yang Di-pertuan Agong
7 Jul 2008

Tuan,

Membersarakan Pegawai/Pembatalan Tauliah Dan Diberhentikan Daripada Perkhidmatan Angkatan Tentera

Dengan hormatnya dimaklumkan bahawa Majlis Angkatan Tentera di Mesyuarat Ke-469 yang bersidang pada 27 Mei 2008 telah memperakukan Membersarakan Pegawai/Pembatalan Tauliah Jangka Pendek dan Diberhentikan Daripada Perkhidmatan Angkatan Tentera bagi 4 orang pegawai-pegawai di bawah Seksyen 9, Akta Angkatan Tentera 1972, Peraturan-Peraturan 20(2)(e),(g) kepada Peraturan-Peraturan Angkatan Tetap (Pencen, Ganjaran dan Faedah-Faedah Lain) 1982 dan Perenggan 8g dan 13, Kepada Perintah Majlis Angkatan Tentera Bilangan 1 Tahun 2004, iaitu:

Seksyen 9

"Yang di-Pertuan Agong boleh atas syor Majlis Angkatan Tentera pada bila-bila masa tanpa memberi apa-apa sebab membatalkan mana-mana tauliah yang dikurniakan di bawah peruntukan-peruntukan bahagian ini".

Peraturan 20(2)(e) dan (g)

"Yang di-Pertuan Agong boleh menghendaki pegawai supaya bersara daripada perkhidmatan:

-1-

(e) oleh kerana ketidakcekapan atau sebab-sebab lain di dalam kawalannya sendiri tetapi tidak terjumlah kepada salahlaku.

(f) oleh kerana salahlaku."

2. Sukacita saya mendapat kerjasama tuan mempersembahkan kepada Seri Paduka Baginda Yang di-Pertuan Agong dan memohon perkenan Baginda di atas perakuan tersebut. Setelah diperkenankan, mohon kembalikan salinan asal surat ini untuk tindakan selanjutnya.

Sekian, terima kasih.

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

t.t.

Dato' Abu Bakar bin Haji Abdullah
Setiausaha
Majlis Angkatan Tentera

[33] It is also important to note that the above letter to His Majesty also does not state the facts or reasons for the 'recommendation'. But do note that His Majesty signified his assent in the above letter itself – on 7 July 2008.

[34] By a letter dated 9 July 2008 addressed to the Chief of the RMAF, the respondent appealed against the decision to cancel his commission and to retire him. There was, however, no response to the appeal.

[35] Instead, on 15 August 2008 he was served with a letter dated 24 July 2008 directing him to settle the 'documentation procedure' for his retirement including collecting his civilian identity card and settling his income tax.

Cancellation Of Commission

[36] Section 9 of the Armed Forces Act 1972 provides:

> **9. Cancellation of commissions.**
>
> The Yang di-Pertuan Agong may on the recommendation of the Armed Forces Council at any time without assigning any reason therefor cancel any commission granted under the provisions of this Part.

[37] In my judgment, according to the above provision, His Majesty the King may cancel an officer's commission only on the **recommendation** of the Armed Forces Council; and in cancelling the commission His Majesty need not have to give any reason. In the present case, however, as I see it, there has not been any **recommendation** by the Armed Forces Council. The letter to His Majesty dated 27 June 2008 from Dato' Abu Bakar, the Chief Secretary of the Ministry of Defence cum Secretary of the Armed Forces Council, that I referred to earlier, is, to my mind, not a **recommendation** for the purpose of s. 9. It is merely a document that **purports** to be a recommendation under that provision. I so hold because, in my view, for the letter of the Secretary of the Armed Forces Council to be a recommendation to His Majesty in the sense as envisaged by s. 9 of the Act, the letter must contain the facts and the reasons for requesting His Majesty to cancel the respondent's commission. But in the present case the letter to His Majesty does not contain the necessary facts and the reasons for the 'recommendation'. It is obvious that the letter merely requested His Majesty to cancel the respondent's commission and to require the respondent to retire; and nothing more than just that. This, to my mind, is highly improper and not in accordance with the intention and spirit of s. 9 of the Act. It could not have been the intention of s. 9 of the Act that His Majesty has no discretion at all in the matter and should act in a mechanical manner. It could not have been the intention of s. 9 that the Armed Forces Council is only required to make a request to His Majesty – and just that. That would be demeaning to His Majesty who under art. 41 of the Federal Constitution is the Supreme Commander of the armed forces; and that the Armed Forces Council functions under the general authority of His Majesty as the Supreme Commander. As the Supreme Commander of the armed forces, His Majesty's role could not have been intended by

the framers of our Constitution to be merely symbolic or just a figure head. Surely His Majesty is expected to play an effective and meaningful role as the Supreme Commander. According to the Concise Oxford Dictionary 11th edn. (revised) 'recommendation' means:

> Recommendation n. a suggestion or proposal as to the best course of action.

[38] Clearly it is far-fetched to suggest that the above 'bare' letter to His Majesty is a suggestion or proposal as to the best course of action to be taken against the respondent. Hence, on the facts of the present case there was no recommendation – or rather, no valid recommendation – of the Armed Forces Council before His Majesty. If there was no recommendation, or no valid recommendation of the Armed Forces Council before His Majesty, then His Majesty could not have exercised his power to cancel the respondent's commission pursuant to s. 9. For, the exercise of His Majesty's power under that section is dependent upon there being, in the first place, a valid recommendation of the Armed Forces Council made to His Majesty.

[39] Therefore, the act of His Majesty cancelling the respondent's commission, with respect, is *ultra vires* s. 9 of the Act.

[40] That the act of His Majesty was, with respect, *ultra vires* s. 9 of the Act can also be looked at from another perspective. In my opinion, under the provision of s. 9, His Majesty is expected to, and indeed must, exercise his discretion. His Majesty is not expected to act and cannot act in a mechanical fashion. He must apply his mind to the matter before him: whether or not the commission of the respondent should be cancelled. The *Wednesbury* principle requires His Majesty to make a rational and reasonable decision (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223). His Majesty cannot act arbitrarily or unreasonably. But His Majesty can only exercise his discretion rationally and reasonably if he has the facts and reasons before him. In the present case, however, the manner the letter to His Majesty from the Armed Forces Council is written, in not stating the facts and the reasons (for 'recommending' the cancellation of the commission), it is obvious that the Armed Forces Council expects His Majesty to act in a mechanical fashion. It is obvious

A that the Armed Forces Council views the role of His Majesty under s. 9 as nothing more but a mere formality, notwithstanding the fact that His Majesty under the Federal Constitution is the Supreme Commander of the armed forces and that the Armed Forces Council acts under the general authority of His Majesty as
B the Supreme Commander. But it is obvious too that His Majesty, with respect, had in fact acted in a mechanical fashion. It is, however, true that under s. 9 His Majesty, in cancelling the respondent's commission, need not give any reason for the cancellation to the officer concerned. But, with the greatest
C respect, this does not mean that His Majesty may act in a mechanical fashion. In *Jain on Administrative Law of Malaysia and Singapore* 3rd edn by Prof M P Jain, the learned author states (at p. 495):

D **Acting mechanically**

> An authority vested with discretion has to apply its mind to the facts and circumstances of the case before taking an action. If it passes an order mechanically without applying its mind, its act will be *ultra vires*. This principle is illustrated by *Emperor v Sibnath*
E *Banerjee*. The Home Secretary issued an order of preventive detention in a routine manner on the advice of the police without himself applying his mind to the materials before him and satisfying himself, independently of the police recommendation, whether an order of preventive detention was called for or not in the circumstances of the case. The Home Department followed a
F practice of issuing a detention order automatically when the police recommended it and the Home Secretary did not personally satisfy himself whether such an order was justified or not in a specific case. The Privy Council quashing the order ruled that the Home Secretary's personal satisfaction in each case was a
G condition precedent to the issue of the order otherwise it would be invalid.

[41] Furthermore, in the present case the Armed Forces Council, in not stating the facts and reasons in its 'recommendation' to His
H Majesty, had not only failed to satisfy the statutory requirement of s. 9 but had also acted arbitrarily and unreasonably. In the first place, there is this pertinent question that needs to be asked. Did the Armed Forces Council have a reason to cancel the respondent's commission? It is true that under s. 9 His Majesty need not assign any reason for the cancellation of the commission.
I

I would interpret 'without assigning any reason' here, under this section, to mean that His Majesty need not have to give any reason for the cancellation of the commission. But this does not mean that the Armed Forces Council can just arbitrarily, without any reason whatsoever, suggest (or 'recommend') to His Majesty that an officer's commission be cancelled. That, to my mind, could not have been the intention of s. 9. The Armed Forces Council must have a reason. And it could not be just any reason; as, for example, that on a particular day the respondent had worn a yellow socks to office! The Council could not act at its whim and fancy. The council has a duty to act rationally and reasonably. The *Wednesbury* principle equally applies to the Armed Forces Council – just as it applies to His Majesty. But if the Armed Forces Council did in fact have a reason, then that reason must be conveyed to His Majesty when making the 'recommendation'. But, instead, we have here a situation where the letter of the Armed Forces Council to His Majesty does not state any reason whatsoever for requesting His Majesty to cancel the respondent's commission (or to require him to retire). But not only that: even the minutes of the 470th meeting of the Armed Forces Council does not contain any reason for the 'recommendation'. I have closely examined the affidavit of Dato' Abu Bakar, the Secretary of the Armed Forces Council, but I am unable to find anywhere in the affidavit that suggests or implies that the Armed Forces Council had a reason to 'recommend' to His Majesty the cancellation of the commission (or to require the respondent to retire). This court cannot assume that the Armed Forces Council had a reason, let alone a reason that is reasonable and rational. The only fair inference that can be drawn here from the facts is that the Armed Forces Council did not have any reason whatsoever to 'recommend' to His Majesty that the commission of the respondent be cancelled (or that he be required to retire). This means that the Armed Forces Council, in making the request to His Majesty, had acted unreasonably or arbitrarily.

[42] Indeed, it is pertinent to observe that the affidavit of Dato' Abu Bakar, the Secretary of the Armed Forces Council, does not provide any reason for the cancellation of the commission (or the reason for the forced retirement of the respondent); and neither does the minutes of the 470th meeting of the Armed Forces Council held on 24 June 2008. Significantly, the affidavit of Dato'

Abu Bakar does not suggest any wrongdoing on the part of the respondent. In fact the affidavit of Dato' Abu Bakar acknowledges the excellent services rendered by the respondent during the 27 years that he served the RMAF (see para. 28 of Dato' Abu Bakar's affidavit); and Dato' Abu Bakar in his affidavit takes pain to state (see paras. 23 and 26 of the affidavit) that the action of the Armed Forces Council in 'recommending' to His Majesty had nothing to do with s. 161 of the Act (s. 161 of the Act deals with wrongdoings on the part of an officer or a serviceman). However, neither does Dato' Abu Bakar, in his affidavit, explain as to why such a drastic action was taken against the respondent. Confidentiality of information pertaining to the reason for the 'recommendation' is not pleaded. In other words, Dato' Abu Bakar in his affidavit does not say that the Armed Forces Council has a reason for the 'recommendation' to His Majesty but he is prevented from revealing the reason in his affidavit by reason of the Official Secrets Act. The affidavit of Dato' Abu Bakar is defensive in nature and uninformative.

The Requirement To Retire Under reg. 20(2)(e)

[43] As can be seen from the documents that I have highlighted above, the cancellation of the commission was not the only action taken against the respondent by the Armed Forces Council. Apart from cancelling his commission, His Majesty, on the 'recommendation' of the Armed Forces Council, also required the respondent to retire pursuant to reg. 20(2)(e) of the Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982. Regulation 20(2)(e) states:

> (2) The Yang di-Pertuan Agong may require an officer to retire from the service:
>
> (a) …
>
> …
>
> (e) for inefficiency or other causes within his own control but not amounting to misconduct;

[44] Although 'commission' and 'retirement' are two separate matters, the Armed Forces Council, however, regarded the matter as closely interlinked and had forwarded its 'recommendation' to His Majesty on these two matters simultaneously in just one

document, that is, the letter of 27 June 2008 (after being decommissioned, the respondent, if he is not forced to retire simultaneously, technically, he becomes a serviceman). Now, although reg. 20(2)(e) of the Regulations, unlike s. 9 of the Act, does not contain the words 'on the recommendation of the Armed Forces Council' it appears to be common ground – and I think the provision must be read as such – that His Majesty, as the Supreme Commander of the armed forces, may only act under reg. 20 of the Regulations on the recommendation of the Armed Forces Council. However, just like the case of the cancellation of the commission, the Armed Forces Council's letter of 27 June also does not provide His Majesty the facts and reasons for the 'recommendation' pertaining to the forced retirement. Again here I also hold that this omission is fatal to the so-called 'recommendation' of the Armed Forces Council as well as to the decision of His Majesty. My reasoning and criticisms in respect of the cancellation of the commission issue equally applies here. Indeed, the need for the facts and reasons to be provided to His Majesty here, in the case of the respondent's forced retirement, is stronger as compared to the case of the cancellation of the commission. For, firstly, here, in the case of reg. 20(2)(e) of the Regulations, unlike s. 9 of the Act, the words 'without assigning any reason therefor' are absent. Secondly, reg. 20(2)(e) of the Regulations prescribes what ought to be the reason (for requiring the personnel to retire), that is, 'for inefficiency or other causes within his own control' (and in interpreting the phrase 'or other causes within his own control' we must apply the *ejusdem generis* rule of statutory interpretation); and what ought not to be the reason: 'for misconduct' (if it is for misconduct, then the action must be taken under a different limb ie, limb (g) of sub-reg. (2) of reg. 20). Therefore, the Armed Forces Council had acted arbitrarily in 'recommending' to His Majesty on the compulsory retirement of the respondent, and His Majesty had acted in a mechanical fashion and without a valid recommendation from the Armed Forces Council in requiring the respondent to retire under reg. 20(2)(e) of the Regulations.

[45] However, there is another reason why I think that the decision of His Majesty with regard to the forced retirement, with respect, is bad in law. It is this. The respondent has never been notified of the reason for his forced retirement. In my judgment, the respondent is entitled to be notified the reason as to his

forced retirement. In my opinion, it is the intention of the Regulations that the reason be made known to the personnel in question, and in the present case, the respondent; otherwise, why are the words 'without assigning any reason therefore', found in s. 9 of the Act, not inserted in reg. 20; and why must limb (e) of sub-reg. (2) of reg. 20 spell out what ought to be the reason for the forced retirement and what ought not be the reason? It must be borne in mind that there is nothing in the Act that states that an officer who is decommissioned (and who thereafter becomes a serviceman) automatically has to be compulsorily retired under reg. 20. It must also be borne in mind that the reputation of the respondent is adversely affected when all of a sudden he is told that he has to go on forced retirement, not to mention the adverse effect on his livelihood. Hence it is wrong and cruel that he is not told of the reason for the forced retirement.

[46] Encik Zalil, learned counsel for the respondent, submits that the respondent is entitled to be heard before the Armed Forces Council made a decision to 'recommend' to His Majesty that the respondent be retired pursuant to reg. 20(2)(e) of the Regulations. This is an interesting point. I am, of course, mindful of *Abdul Salam Husin v. Majlis Angkatan Tentera & Anor* [2011] 2 CLJ 1. But that case, as rightly pointed out by Encik Zalil, concerns s. 9 of the Act, and not with reg. 20(2)(e) of the Regulations, and hence is irrelevant. But be that as it may, with respect, as there has been no valid recommendation made by the Armed Forces Council to His Majesty pertaining to the forced retirement, meaning that this very fact alone had made the decision of His Majesty was *ultra vires* reg. 20, I find it unnecessary to go into this issue as to whether or not the respondent is entitled to be heard.

[Appeal dismissed with costs].